IN THE

Supreme Court of the United States

OCTOBER TERM, 1897.

PEDRO PEREA, Appellant, vs. GEORGE W. HARRISON, Appellee.	}	Cross Appeal.

I.

The court below made an order on the application of the complainant below granting him a cross-appeal. No affidavit of value was filed, and no bond for costs was given.

"Cross Appeals must be prosecuted like other appeals. Every appellant to entitle himself to be heard on his own appeal, must appear here as an actor in his own behalf by having the appearance of counsel entered, and giving the security required by the rules. Otherwise, if he is here as appellee on the appeal of his adversary, he will be heard only in support of the decree as it was entered below. If he asks affirmative relief beyond what he got below, he must enter himself in this court in due time as the prosecutor of his own appeal, even though his adversary has docketed the case against him."

The "S. S. Osborne," 105 U. S. 447-451. Also see Hilton vs. Dickinson 108 U. S. 165. Farrar vs. Churchill 135 U. S. 609.

II.

The only matters the cross appellant can have revived in this Court are such matters as the Supreme Court of the Territory determined against him. He did not appeal from the decree rendered by the District Court to the Supreme Court of the Territory. His only standing in the Supreme Court of the Territory, under the authorities above cited, was to sustain the decree of the District Court.

The Supreme Court of the Territory is an appellate court. "Without an appeal a party will not be heard in an appellate court to question the correctness of the decree of the trial court."

Cherokee Nation vs. Blackfeather, 155 U. S. 221.

The Stephen Morgan, 94 U. S. 599.

In the case of the San Pedro &c Company vs. United United States, this Court quotes from the decision of the Supreme Court of the Territory as follows:

"There being no cross appeal by the appellee, we decline to review the action of the court below, as that is not before us on the appeal, and overrule said motion and decline any action upon it for reasons stated."

This court approved this proposition and said: "We cannot review the action of the District Court, * * *"

San Pedro &c Co. vs. U. S. 146 U. S. 138.

In Topliff vs. Topliff, 145 U. S. 173, this Court said:

"And in McMicken vs. Perin, 18 How. 507, it was held directly that this court will not interview a master's report upon objections taken here for the first time. In affirmance of this principle, Rule 21 (Sub. 2) requires that 'When the error alleged is to a ruling upon the report of a master, the specification shall state the exception to the report and the action of the court upon it.' This presupposes that the particular exception relied upon was taken in the court below and was passed upon adversely to the appellant. Proper practice requires that objections to a master's report shall be taken in that court, that any errors discovered therein may be rectified by the court itsself, or by a reference to the master for a correction of his report, without putting parties to the delay and expense of an appeal to this court. It would be manifestly unjust if this court, after having affirmed the action of the court below in every other particular, should take up an error in a master's report which was not called to its attention, and reverse the case upon that ground, when if exception had been duly taken, the error could have been at once corrected."

So in Burns vs. Rosenstein, 135 U. S., 455, the court in speaking of an assignment of error, not based on exceptions to the master's report said:

"If he went beyond the order of reference, or if the account taken by him, involved a misconception of the provisions of that agreement, the defendants should have brought those matters to the attention of the court by exceptions to the report. Having failed to do this, they cannot, in this court for the first time object that the master proceeded upon erroneous views as to the contract between the parties. Equity Rule 83; Brockett vs. Brockett, 3 How. 692; McMicken vs. Perin 18 How. 504. Story vs. Livingston 13 Pet. 359-366; Medsker vs, Bonekroaker 108 U. S. 66-71."

III.

The cross-appellant in the district court filed a motion to confirm the master's report, Record, folio 337. At the same time he filed two exceptions to the report. Record, folio 207. He has filed four assignments of error in this court, and we submit that his third assignment of error is the only one that rests on any exception to the master's report. The second exception to the master's report is as follows:

"That the said master should have found, as a matter of law, that the expense of this litigation, including reasonable solicitors' fees, are chargable to the portion of the estate belonging to the said George W. Harrison, and that the said George W. Harrison should pay over to the said complainants, as administrators, statutory fees on the portion remaining in his hands, and the solicitors; fees and other expenses of this litigation." His third assignment of error is as follows: "The said court erred in failing to decree all of the costs of this litigation, including solicitors' fees, to be paid by the appellant, George W. Harrison, and in decreeing the payment of the same out of the fund."

An inspection of the decree rendered by the District Court will show that the sum of $5,000.00 solicitors' fees, and the sum of $1,727.26, commissions allowed the administrator, were to be deducted from the total amount found due, to-wit: $31,545.32, and the remainder was divided into twenty-six parts. The defendant, it was decreed, should retain seventeen of these parts and the other nine were to be paid to the complainant. Record, folio 346-7.

The master's findings as to amounts, and recommendations, were followed, except that the master recommended that the complainant and cross-appellant only be allowed commissions on the nine twenty-sixths, to be paid over to him. Record folios 123-124. The

District Court generously allowed him commissions on the whole, thereby sustaining in part the cross-appellant's second exception to the master's report. The master recommended that the solicitor's fee of $5,000 be charged against the defendant. The District Court decreed that both the commissions and the solicitor's fee should first be deducted from the total amount, a nd that it should then be divided as above stated.

The only changes made by the Supreme Court in the decree of the District Court, was the reduction of the attorney's fee from $5,000.00 to $3,586.97, and the master's fee was reduced from $1,000 to $500.

The master, and the decree of the District Court, expressly found against the contention of the cross-appellant, as made by his first assignment of error. See Master's eighth finding, record, page 74. Decree of District Court, record, folios 346-347. No exception was filed to the master's report on this account. See cross-appellant's exceptions, record, page 207. No appeal was taken from the District Court.

The same thing is true of the cross-appellant's second assignment of error. Same references to the record.

There was an exception to the finding of the master as to the commissions, which was practically sustained by the District Court, and, afterwards the Supreme Court followed the District Court in allowing commissions and taxing them against the whole estate. The District Court by its decree did exactly what the cross-appellant complains of here, and no appeal was taken from the District Court to the Supreme Court. According to the decisions above cited this Court can not consider this assignment of error. The master

stated the interest account and did not charge compound interest. Both the District Court and the Supreme Court followed the master in this respect. See Master's Findings, five and six, record, pages 73-4. Decrees, record, folios 346, 364. No exceptions to the master's report was taken on this account, and no appeal from the District Court.

IV.

It follows, that as the cross-appellant's assignments of error are not based upon any exceptions to the master's report, and no appeal was taken from the District Court, they cannot be considered in this Court. They are not based on any modification of the decree of the District Court by the Supreme Court. Therefore, the only standing the cross-appellant has in this Court is to sustain the decree of the Supreme Court. This would be true even if he had perfected his cross-appeal. The Supreme Court of New Mexico in the opinion rendered in this case recognized the principle, that it is too late to assert in the appellate court a right which had not been recognized in the court below.

This is fundamental. The cross-appellant should certainly have given the Supreme Court of the Territory an opportunity to correct any errors of the District Court by calling their attention to them before he can ask this Court to do so. He should certainly have given the District Court an opportunity to correct any erros of the master, by filing exceptions to his report.

V.

It clearly appears that no cross-appeal has ever been perfected in this court. The burden of proof of the amount in controversy to establish the jurisdiction is upon cross-appellant. It may or may not be true that

the assignments of error by the cross-appellant raise questions involving as much as $5,000.00, exclusive of costs. No affidavit was filed; no security for costs given. Nothing has been done, except that the court below has made an order granting the cross-appeal. This is not perfecting it in the same manner as the statute requires an appeal to be perfected.

VI.

The cros-appellee, by the contention above made, does not mean to concede that there is any merit in any of the assignments of error made by the cross-appellant. He insists that there is not in any of them any merit whatever. The first assignment of error, if based upon a construction of the statute of New Mexico, cross-appellee is ready to argue has no merit whatever: if it is based upon the proposition that the Court is limited to the findings of fact made by the Supreme Court of New Mexico, that it is equally without merit.

In case of an appeal from a Territory, under the act of 1874, this Court said:

"Under this act if the findings of the District Court are sustained by the Supreme Court, and a general judgment of affirmance rendered, the findings of the District Court, thus approved by the Supreme Court, will furnish a sufficient 'statement of the facts in the case' for the purpose of an appeal to this court."

Stringfellow vs. Cain, 89 U. S. 612.

The decree of the District Court, that of the Supreme Court, as well as the master's findings, are against the cross-appellant on his first assignment of error. The same thing is true of the second and fourth assignments of error. The principles involved in the second assignment have been considered fully in the

brief filed by the cross-appellee on his appeal. The same thing is true as to the fourth assignment of error, and we submit that no authority has been cited by the cross-appellant which would justify the charging against the defendant of compound interest under the circumstances of this case.

We respectfully submit that the cross-appeal should be dismissed.

WM. B. CHILDERS,
Solicitor for Appellee.